BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2000-207-W/S - ORDER NO. 2001-1009

OCTOBER 17, 2001

IN RE:	Application of Carolina Water Service, Inc. for Approval of an Increase in its Rates for Water for all its Service Areas and Sewer Service for certain of its Service Areas.	))))	ORDER DENYING PETITIONS FOR RECONSIDERATION

This matter comes before the Public Service Commission of South Carolina ("Commission") on separate Petitions for Reconsideration filed by the River Hills Community Association, Inc. ("RHCA") and the Consumer Advocate for the State of South Carolina ("Consumer Advocate"). The instant docket was instituted when Carolina Water Service, Inc. ("CWS" or the "Company") filed an application seeking approval of a new schedule of rates and charges for water and sewer service that CWS provides to its customers within its authorized service areas in South Carolina. The RHCA and the Consumer Advocate were admitted as parties of record in the instant docket. Following a hearing on the application of CWS, in which hearing both the RHCA and the Consumer Advocate participated, the Commission issued Order No. 2001-887, dated August 27, 2001, by which the Commission set forth its decision on the case. Both the RHCA and the Consumer Advocate timely filed their Petitions for Reconsideration in which both the RHCA and the Consumer Advocate request the Commission to reconsider the decision contained in Order No. 2001-887. For the reasons set forth below, the Commission denies the Petitions for Reconsideration.

Petition of RHCA

By its Petition, RHCA alleges the following four errors on the part of the Commission in Order No. 2001-887:

(1) that CWS is not entitled to a rate increase for customers in the Lake Wylie service territory;

(2) that any increase may not exceed that which can be produced by adoption of a return on equity ("ROE") of 10.7% and an overall rate of return ("ROR") of 9.66%;

(3) that the Commission erred in failing to adopt the growth projections proposed by RHCA in computing the income requirement of CWS; and

(4) that the establishment of an uniform rate schedule creates an inequity for the Lake Wylie customers.

Discussion of Issues:

RHCA's first two allegations of error are contained in Paragraph 4 of its Petition: first, that CWS is not entitled to a rate increase for customers in its Lake Wylie service territory and, second, that any increase may not exceed that which can be produced by adoption of a ROE of 10.7% and an overall ROR of 9.66%. The Commission will address these two allegations from Paragraph 4 in reverse order.

With regard to the rates of return, CWS submits in its Answer to RHCA's Petition that RHCA is barred from seeking reconsideration of the Commission's determination of an appropriate ROE and overall ROR since RHCA did not raise this issue at hearing. The Commission agrees with CWS's argument. Having failed to raise the issue below,

RHCA may not raise it for the first time on a petition for reconsideration. *Cf. Patterson v. Reid,* 318 S.C. 183, 185, 456 S.E.2d 436, 437 (1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.") In order to avoid the effect of its failure to raise the issue at hearing, RHCA attempts to rely upon the fact that the Consumer Advocate (purportedly) raised the issue below. ("[A]s revealed by the Consumer Advocate, CWS's requested rate of return on equity is calculated to be 10.7 %.") RHCA Petition at 2. One problem inherent in this contention is that the Consumer Advocate did not object to the testimony offered by CWS witness Ahern. See Petition for Reconsideration of Consumer Advocate, Docket No. 2000-0207-W/S, September 19, 2001 at 3. ("The Consumer Advocate did not have to object to the Company's rate of return testimony...") Furthermore, even if the Consumer Advocate had so objected, a party may not preserve an issue for review by way of an objection raised by another party in the case. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187, n.3 (1997) ("appellant cannot bootstrap an issue for appeal by way of a codefendant's objection").

Moreover, even if RHCA had raised the issue below or could rely upon the Consumer Advocate's "objection", RHCA has failed to state any basis for the Commission to reconsider its decision. RHCA has failed to seek reconsideration of the Commission's conclusion that CWS did not request in its application approval of an overall ROR 9.66% or a 10.7% ROE. Order No. 2001-887 at 20-23. To the contrary, RHCA only asserts that CWS made such a request in its application without specifying how the Commission's determination otherwise was in error. RHCA Petition at 2. A

petition for reconsideration must set forth specifically the ground on which the petitioner contends the Commission's decision or order to be unlawful. S.C. Code Ann. Sec. 58-5-330(1976) and 26 S.C. Code Ann. Regs. R. 103-881.B (Supp. 2000). Under 26 S.C. Code Ann. Regs. R. 103-836.A.4 (1976), a petition for reconsideration must, *inter alia*, set forth the alleged error or errors in the Commission's order and provide authority supporting such allegation. RHCA has therefore failed to comply with the applicable statute and pertinent Commission regulations because it has not stated any grounds upon which the Commission should reconsider its determination that CWS did not request a 9.66% overall ROR and a 10.7% ROE.

Additionally, even assuming that RHCA had properly raised the issue of an appropriate overall ROR and ROE at hearing, and also stated grounds for reconsideration of the Commission's determination in that regard in its Petition, the assertion by RHCA that "cost of common equity should not exceed 10.5%" and "[t]he overall return...should not exceed 9.66%" (RHCA Petition at 2) is without merit.[1] RHCA states that "[t]he Commission owes CWS's customers a duty to investigate, audit and, if necessary, recalculate CWS's rate base and expenses." RHCA Petition at 2. The record in this case demonstrates that the Commission Staff did just that, and the Commission adopted the Staff's position in that regard. However, RHCA argues that the Commission was required to utilize as appropriate returns on equity and rate base figures which are generated using the rate base and expenses proposed by CWS and not those approved by

[1]RHCA also erroneously asserts that "the Commission established an overall rate of return of 11.5% for CWS." RHCA Petition at 2. The overall ROR approved by the Commission for CWS is 10.06%. Order No. 2001-887 at 7 and 23.

the Commission. RHCA simply provides no basis for the Commission to reconsider its determination on this very point. Order No. 2001-887 at 21 and footnote 6.

RHCA further argues that "the Commission owes CWS no duty to enhance or increase CWS's overall rate of return beyond that requested." RHCA Petition at 2. RHCA's argument is apparently in support of RHCA's contention that the Commission erred in adopting an overall ROR greater than the 9.66% purportedly requested by CWS in its application. RHCA Petition at 2. RHCA demonstrates the flaw inherent in its argument by its further assertion that "where the Commission deems it appropriate to grant CWS a rate increase, the Commission should grant CWS no more than that which it asks." RHCA Petition at 2. This last statement recognizes the verity of that which the Commission found in its order in this regard - i.e., that it is the rates requested that frame the issue in a water and sewer rate case. Order No. 2001-887 at 22, citing *Seabrook Island Property Owners Association v. South Carolina Public Service Commission, et al.*, 303 S.C. 493, 401 S.E.2d 672 (1991). The Commission did not grant to CWS a rate increase greater than that requested by CWS. The Commission granted an increase in rates less than that requested in the application. Order No. 2001-887 at 7 and 8.

And, even assuming as asserted by the RHCA that the increase in rates granted by the Commission produced an overall return greater than that requested by CWS in its application, the fact that the increase in rates granted did not exceed the increase in rates requested is controlling. *Hamm v. South Carolina Public Service Com'n. and Motor Truck Rate Bureau, Inc.*, 289 S.C. 22, 344 S.E.2d 600 (1986). In *Hamm*, the applicant requested an increase in rates of eight percent and stated in its application that the effect

of granting the full increase requested would be to allow it an operating ratio of 95.7%. *Id.*, 344 S.E.2d at 602. The Commission disallowed $91,968 of expenses claimed by the applicant, but awarded the full eight percent rate increase requested, which yielded an operating ratio of 93.7%. *Id.* The Consumer Advocate challenged the Commission's decision to grant the full amount of the requested rates, asserting that by granting the full increase requested, the Commission allowed the applicant to achieve a more favorable operating ratio than that stated in its application. *Id.* In rejecting the Consumer Advocate's argument, the Supreme Court stated that "[i]t was within the Commission's authority to determine whether the entire eight percent should be granted based upon all the evidence presented in the case." *Id.* Because the Commission did not award CWS an increase in rates in excess of that which it requested, there is no error and RHCA has failed to state any grounds for reconsideration.

RHCA also alleges in paragraph 4 "that CWS is not entitled to a rate increase for its customers in its Lake Wylie service territory" and "that the Commission erred in granting CWS a rate increase for its Lake Wylie customers". RHCA Petition at 2. RHCA fails, however, to state in paragraph 4 any grounds to support these allegations or to relate them to the arguments it makes in paragraph 4 relating to the overall ROR or ROE allowed by the Commission. RHCA has therefore failed to state any grounds for reconsideration. S.C. Code Ann. Sec.58-5-330 (1976) and 26 S.C. Code Ann. Regs.103-881.B (Supp. 2000) and 103-836A.4 (1976). Further, RHCA did not assert at hearing that the Commission should not grant CWS a rate increase for its Lake Wylie customers but, rather, asserted that the Commission should not grant *any* rate increase to CWS.

Harrington Direct, p.7, l. 23 - p.8., l.2 ("As a result, Carolina Water Service, Inc. does not need a water or sewer increase to maintain a reasonable profit established by this Commission.") Having failed to raise at hearing the issue of exempting "Lake Wylie customers" from any increase the Commission might choose to award the Company, RHCA may not raise it for the first time on a petition for reconsideration. *Patterson v. Reid, supra.*

RHCA next alleges error on the part of the Commission in not adopting the growth projections proposed by RHCA in computing the income requirements of CWS. The Commission finds that it properly rejected RHCA's proposal that witness Harrington's growth projections be considered in the Commission's determination regarding customer growth. Order No. 2001-887 at 8 and at 63-67. In Order No. 2001-887, the Commission, in rejecting the proposal advanced by RHCA, found that the RHCA proposal did not consider any increase in expenses resulting from customer growth and further found that the RHCA proposal violated the known and measurable rule. The Commission finds no reason to reconsider its earlier decision. The proposal of RHCA only considers revenues and provides no corresponding adjustment for expenses. As the Commission stated in Order No. 2001-887, "[w]hile it would be difficult to calculate the precise amount of expenses that the addition of one customer would add, it does not make sense to ignore expenses altogether when looking at customer growth." Order No. 2001-887 at 64. The Commission in adopting the customer growth adjustment proposed by the Staff found that the "Staff's adjustment, which is applied to Net Operating Income and which therefore applies to both revenues and expenses, is a

reasonable adjustment that comes with a 'reasonable degree of certainty'." Order No. 2001-887 at 64-65.

Finally, RHCA asserts error in the rate design from Order No. 2001-887. RHCA asserts that the establishment of a uniform rate schedule creates an inequity for the Lake Wylie customers. The Commission would note that the RHCA did not assert to the Commission in the hearing of this matter that CWS should not be granted "a rate increase for its Lake Wylie customers." RHCA Petition at 5. To the contrary, RHCA asserted that there should be no increase at all. Harrington Direct, p. 7, l. 23 - p.8, l. 2. Having failed to raise the issue at hearing, RHCA may not raise it for the first time in its petition. *Patterson v. Reid, supra.*

Moreover, even if RHCA had raised this issue below, there is no evidence of record to support a rate design which would permit customers in River Hills to continue being subsidized by the remainder of the Company's customer base. The Supreme Court of South Carolina has recognized that uniform rate structures are the norm in the law of utilities regulation - particularly in the context of water service. *August Kohn & Co., Inc. v. Public Serv. Com'n*, 290 S.C. 409, 313 S.E.2d 630 (1984). Exceptions to the general rule favoring uniform rates are infrequent and are generally the product of special facts and circumstances. *Id.* at 631. The basis for the general rule is recognized to be the inherent difficulty attendant to making accurate allocations and fixing fair rates for different parts of a utility's service territory. *Id.* In order to justify a departure from a uniform rate structure, it is incumbent upon RHCA to demonstrate facts which warrant such a departure. *Id.*, 313 S.E.2d at 632.

RHCA has not demonstrated facts which would warrant a continuation of the favorable treatment its members have been receiving over the last seven years *vis-a-vis* CWS's other water and sewer customers. The evidence reveals that River Hills customers were excluded from the CWS's last rate case because of the imminency of a bulk water and sewer service connection arrangement with York County - the same circumstance that some of CWS's other customers face today. (Wenz Rebuttal, p. 14, ll. 18-29).[2] Therefore, the Commission is not "forced to conclude that CWS determined that equity did not require a rate increase for its Lake Wylie customers in 1994." RHCA Petition at 4. Having benefited from that circumstance for over seven years, RHCA now contends that its members should be allowed to continue receiving a lower rate than CWS's other customers because to do otherwise requires them to pay a higher percentage increase in order to be placed on the same footing as other customers. This "analysis" ignores the fact that RHCA's members have for over seven years enjoyed the benefit of lower rates than other customers. And, when reduced to its essentials, RHCA's argument is nothing more than a contention that, because its members have been able to pay less than other customers in the past, other customers should continue to bear the burden of paying more. RHCA's assertion forms no basis for a reconsideration of the Commission's Order.

Based upon the explanation found in Order No. 2001-887 and the discussions above, the Commission finds no basis in the allegations of error noted by RHCA, and the Commission hereby denies the Petition for Reconsideration filed by RHCA.

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[2]This circumstance is recognized by the Commission to justify a variance for certain parts of the Company's service area from the uniform sewer rates approved. Order No. 2001-887 at 8 and at 68-69. RHCA does not challenge this variance.

Petition of Consumer Advocate

The Consumer Advocate, by its Petition, raises the following allegations of error in Order No. 2001-887:

(1) that the Commission abused its discretion in approving a rate of return on equity of 11.5%, and a resulting overall rate of return of 10.06%;

(2) that the Commission committed error in approving the Commission Staff's proposed adjustment for Deferred Expenses because the expenses were not shown to be extraordinary in nature;

(3) that the Commission erred in not addressing the Consumer Advocate's argument regarding over-recovery of rate cases expenses by CWS since CWS's last rate proceeding in 1994;

(4) that the Commission erred in approving rate case expenses of $116,793; and

(5) that the Commission erred in not addressing the Consumer Advocate's rate design proposal made in his post-hearing Brief concerning the prevention of one portion of CWS's system from inappropriately subsidizing another.

Discussion of Issues:

In Paragraph 4 of his Petition, the Consumer Advocate contends that the Commission abused its discretion by approving a ROE of 11.5% and an overall ROR of 10.06% because CWS purportedly admitted in its application and a discovery response that a reasonable overall ROR was 9.66% and a reasonable ROE was 10.7%. Consumer Advocate's Petition at 2. The Consumer Advocate's argument amounts to an assertion that the Commission should not have allowed a ROE of more than 10.7 % and an overall

ROR of more than 9.66%. In Order No.2001-887, the Commission found that "the Company's application did not request an 'overall rate of return be set at 9.66%'." Order No. 2001-887 at 20. The Commission in Order No. 2001-887 addressed this contention of the Consumer Advocate and found the Consumer Advocate's assertion flawed. Order No. 2001-887 at 20-23. In addition to the reasons set forth in Order No. 2001-887, the Commission finds the Consumer Advocate's arguments in this regard are without merit for the following reasons:

(a) As an initial matter, the Commission notes that the Consumer Advocate has failed to seek reconsideration of, or even address, the Commission's two primary conclusions on this issue, i.e. (1) that the application did not request an overall ROR of 9.66% (and, inferentially, a ROE of 10.7%) and (2) that CWS's application and response to Interrogatory 1-35 do not constitute an admission that such returns are reasonable. Order No. 2001-887 at 20-22. Although he so asserted in his Post Hearing Brief, the Consumer Advocate does not contend in his Petition that the application requested approval of such rates of return. That argument is therefore abandoned. As to the assertion that the application and discovery response constitute an admission that such rates of return are reasonable, the Petition merely repeats the same conclusory assertion made in the Post Hearing Brief to that effect, but fails to bring to the Commission's attention any basis upon which the Commission could conclude that its determination that there was no admission was erroneous. Consumer Advocate's Post Hearing Brief at 7; Consumer Advocate's Petition at 7. A petition for reconsideration must set forth specifically the ground on which the petitioner considers the Commission's decision or

order to be unlawful. S.C. Code Ann. Sec. 58-5-330 (1976) and 26 S.C. Code Ann. Regs R. 103-881.B (Supp. 2000). Under 26 S.C. Code Ann. R. 103-836.A.4. (1976), a petition for reconsideration must, *inter alia*, set forth the alleged error or errors in the Commission's order and authority supporting such allegation. The Consumer Advocate has failed to comply with the requirements of the applicable statute and pertinent Commission regulations because he has not provided to the Commission any grounds upon which it should reconsider its determinations that the Company neither requested, nor admitted to the reasonableness of, a 9.66% overall ROR and a 10.7% ROE.

(b) The Petition ignores the fact that the Commission did not approve an overall ROR or a ROE based upon the testimony of the Company's witness. Rather, the Commission adopted the ROE which was within the range reflected in the opinion of Dr. Spearman. For the Consumer Advocate's argument to have any practical effect, he would have to demonstrate that the Commission abused its discretion in accepting Dr. Spearman's expert testimony on the issue of an appropriate ROE. Not only has the Consumer Advocate failed to do so, he has not even suggested that the Commission was in any manner prevented from accepting Dr. Spearman's opinion testimony. The Consumer Advocate having failed to seek reconsideration of the Commission's adoption of Dr. Spearman's opinion regarding ROE, has failed to state a ground for reconsideration.

(c) Even assuming that the Commission was to have relied upon the opinion of CWS's witness in determining an overall ROR and ROE, the Consumer Advocate has still failed to state any basis for reconsideration. As noted by the

Commission in Order No. 2001-887, nowhere in its application did the Company request, or assert the reasonableness of, any overall ROR - including one of 9.66%. At most, the Company stated in Schedule "C" of Exhibit "B" what an overall ROR would be if the full increase were granted using CWS's proposed rate base and accounting adjustments. Neither the Company nor the Commission is bound by such a statement. *Hamm v. South Carolina Public Service Com'n and Motor Truck Rate Bureau*, 344 S.E2d at 602-603.

(d) Further assuming, for the purposes of the Consumer Advocate's argument, that the Commission could be so bound, an admission by the Company in its application that an overall ROR of 9.66% was reasonable must be implied since no statement to that effect is made. See *Wade v. Brooks*, 306 S.C. 553, 413 S.E.2d 333 (Ct. Apps. 1992), (holding that an agreement manifested by words is deemed express, while an agreement manifested by conduct is deemed implied). Moreover, as the Consumer Advocate acknowledged in his Post Hearing Brief,[3] a ROE of 10.7% can only be implied from the Company's statement set forth in Schedule "C" of Exhibit "B." Finally, neither Consumer Advocate Interrogatory 1-35 nor the Company's response thereto mentions a reasonable ROR or ROE.[4] Thus, an admission to that effect can only be implied from this discovery. Given that the admission asserted by the Consumer Advocate is not express, the Commission was entitled to interpret the Company's application, Consumer

[3]"If one backs out the return on equity from this requested overall return, the requested rate of return on equity is 10.7%". Consumer Advocate Post Hearing Brief at 7.

[4]CWS's reference to a reasonable return on its investment is just that - a return on investment, not rate base or equity. A utility may have investment that is not part of allowable rate base for ratemaking purposes; in fact, the Commission did not permit CWS in this case to include certain of its investment in rate base when it excluded certain of CWS's water wells.

Advocate Interrogatory 1-35, and the Company's response thereto to ascertain whether an admission should be implied. The interpretation of pleadings is an issue of law. *Muller v. Myrtle Beach Golf & Yacht Club*, 303 S.C. 137, 141, 399 S.E.2d 430, 433 (Ct. App.1990). Admissions in discovery are to be treated as admissions in pleadings. *Id.* Uncertain admissions are not binding upon anyone and a court may refuse to bind a party to its ambiguous discovery response. *Id.* As the Commission was left to ascertain the interpretation of the application and the discovery response, the Commission finds no error in its finding that the application and discovery response do not constitute an admission, and therefore, no abuse of discretion exists.

For his second alleged error, the Consumer Advocate asserts that the Commission erred in approving the Commission Staff's proposed adjustment for Deferred Expenses. The Consumer Advocate asserts that the Deferred Expenses allowed by the Staff have not been shown to be extraordinary.

Consumer Advocate witness Bleiweis proposed that CWS's entire proposed Deferred Expense amount of $76,706 be denied; however, witness Bleiweis did not base his proposal on the ground now asserted by the Consumer Advocate. Witness Bleiweis asserted that the entire amount of Deferred Expense claimed by CWS should be disallowed only because (a) it consisted of expenses incurred prior to the test year and (b) the Company had not sought prior Commission approval to defer them. Bleiweis Direct, p. 10. l.1 - p. 12, l. 15. Nowhere in his testimony did witness Bleiweis challenge the expenses on the grounds that they were not extraordinary.

The Consumer Advocate in his Reply to CWS's Answer to the Petition for Reconsideration contends that he raised the issue of whether or not the Deferred Expenses at issue in this case were extraordinary during cross-examination of Staff witness Scott. Consumer Advocate Reply at 2. The Consumer Advocate further contends that "witness Scott admitted that utility companies could normally incur legal and regulatory expenses at issue here during years other than test year." Consumer Advocate's Reply at 2. With regard to the cross examination of witness Scott, witness Scott testified, in response to a question by the Consumer Advocate, that Staff removed the items from Deferred Expenses "because they are just regular maintenance items which the Company would be allowed to expense in a test year, so they are not extraordinary items or nonrecurring items; they were just routine items." TR. p. 380, ll 22-25. Upon further questioning, witness Scott stated that the items she included in Deferred Expenses were not seen as normal operations but "were considered nonrecurring or extraordinary items." TR. p. 381, ll. 1-6. Finally, the Consumer Advocate asked witness Scott "Is it typical for a utility to have other legal matters in a year outside the test year?" To which question witness Scott responded, "Yes, it is. There may have been other issues besides the rate case where they appear before the Commission." TR. p. 381, ll. 10-13.

The Commission finds that the cross examination of witness Scott does not properly preserve the issue that the Consumer Advocate now asserts. The Consumer Advocate did not direct his questioning to any specific items included by Staff witness Scott in Deferred Expenses. Staff witness Scott stated that she included items in Deferred

Expenses that were not seen as normal operations but were considered nonrecurring and extraordinary. The Consumer Advocate's only challenge to that position was to ask if a utility may have other legal matters in a year other than a test year.

It is well-settled that expenses incurred by a utility are presumed to be reasonable. *Hamm v. S.C. Public Service Com'n*, 309 S.C. 282, 422 S.E.2d 110 (1992). This presumption then shifts the burden of production to the Commission or other contesting party to demonstrate a tenable basis that an expense incurred is not reasonable, i.e., was not prudently incurred. *Id.*, 422 S.E.2d at 112-113. The Consumer Advocate produced nothing to demonstrate that any of the Deferred Expenses allowed were unreasonable. The Commission Staff, on the other hand, examined the Deferred Expenses in its audit and, after having done so, confirmed to the Commission that they were in fact unanticipated and non-recurring. Scott Direct, p. 1, l. 19-p. 2, l. 10, p. 7, ll. 1-4 and ll. 6-11. Accordingly, the only conclusion to be had from the evidence of record is that the Deferred Expenses were reasonable and extraordinary.

Even if the Consumer Advocate had properly challenged whether the Deferred Expenses allowed were extraordinary, there is substantial evidence to support the Commission's conclusions. The Staff proposed to include $281,948 in Deferred Expenses, consisting of attorneys fees of $2,087 incurred in connection with the agreements for CWS to interconnect its Lake Murray water system with a bulk service provider, an inflow and infiltration study CWS performed at an expense of $8,674, and legal expenses of $271,187 incurred in various regulatory matters, including three proceedings before this Commission and a litigation matter related to CWS's authority to

serve in its authorized service area. Scott Direct, p. 7, ll. 7-14. These expenses will be addressed in reverse order.

(a) Legal Expenses for Regulatory Matters:

Prior to the test year, but subsequent to CWS's last rate case, CWS has been required to litigate three matters before the Commission which involved application of the Company's approved rate schedule in River Hills. The first such matter involved CWS's interconnection of the River Hills systems with the bulk service system of York County and the pass-through of the York County bulk rates as authorized in Order No. 94-484, May 31, 1994, Docket No. 93-738-W/S. In Docket No. 96-040-W/S, CWS was required to obtain Commission approval to place the pass-through into effect, even though its rate schedule specifically permitted same and the interconnection had previously been approved by the Commission. Several parties intervened in that matter, including both of the Intervenors in this case - the Consumer Advocate and the RHCA. The litigation of this matter was testified to extensively by Company witness Daniel and also by Company witness Wenz. Daniel Direct, p.8, l. 25, - p.10, l. 5; Wenz Direct, p.10. ll. 16-20. Their testimony is substantial evidence to support the allowance of legal expenses associated with the "Bulk Rate issues" portion of the allowed deferred expense adjustment. Order No. 2001-887 at 35.

Subsequent thereto, in 1997, CWS was required to defend against two complaint proceedings at the Commission challenging CWS's rates approved in its 1993 rate case. One of these proceedings was brought by a North Carolina developer, Mark Erwin, who sought to challenge CWS's approved impact fees, while the other was brought by RHCA

which challenged the reasonableness of CWS's service rates that had been approved in its last rate case. These two complaints were consolidated for hearing in Docket No. 97-464-W/S and resulted in the issuance of Order No. 98-384 dated May 27, 1998. As that order reflects, CWS was subjected to a night hearing in the Lake Wylie area in addition to an evidentiary hearing before the Commission. Although he attempted to intervene, the Consumer Advocate was not allowed to participate as a party of record. See Order No. 98-179, March 6, 1998. The Company appealed Order No. 98-384 to the Circuit Court, which appeal was settled and culminated in the issuance of Order No. 1999-245. Neither of these complaints resulted in a change in CWS's previously authorized service rates. These matters were also discussed at length in the direct testimony of CWS's witnesses Daniel and Wenz. Daniel Direct, p.10, ll. 7-29; Wenz Direct, p.10, l. 11 - p.11, l. 10. Their testimony is substantial evidence supporting the "Erwin Complaint" portion of the legal expenses allowed in the Deferred Expense adjustment. Order No. 2001-887 at 35.

In 1998, the Commission took up issues arising out of CWS's 1993 rate case and remanded to it by the Supreme Court in *Porter v. South Carolina Public Service Com'n and Carolina Water Service, Inc., supra.* On remand, the Commission issued Order No. 98-163 dated March 2, 1998, in which it addressed all issues remanded except for that dealing with CWS's new account charge. As required by the Supreme Court's opinion, a hearing was held on April 15, 1998, to address the new account charge. CWS presented testimony and was represented by counsel at hearing. Order No. 98-369 at 1-2. Likewise, the Staff presented testimony. *Id.* The Consumer Advocate presented no

witness, but was represented by counsel and cross-examined the Staff's witness. *Id.* at 4. The Commission reduced CWS's previously approved $26 new account charge to $13.50. *Id.* at 6. Although he did not seek reconsideration of Order No. 98-369, the Consumer Advocate filed a petition for reconsideration of Order No. 98-163, which CWS opposed. The Commission denied the petition for reconsideration in Order No. 98-311. The Supreme Court's decision was directly referenced in the testimony of Staff witness Scott and in the context of the treatment of Deferred Expenses. Scott Direct, p. 7, ll. 1- 4.

The Commission finds that the expenses incurred for legal fees associated with all three of these matters before the Commission constitute extraordinary expenses. The expenses incurred by CWS in having to litigate the justness or reasonableness of rates previously approved in a rate case are neither anticipated nor recurring. *Porter*, 493 S.E.2d at 97 ("An extraordinary expense is one that is unanticipated and non-recurring.") In fact, because the law presumes that rates previously approved by the Commission are just and reasonable[5], litigation regarding those rates could only be unanticipated and non-recurring. The re-litigation of such rates can hardly be characterized as "routine and required at regular intervals." *Porter*, 493 S.E.2d at 98.

(b) Litigation with Clover School District:

In 1999, CWS instituted litigation against the Clover School District No. 2 of York County and the Town of Clover to prevent them from circumventing CWS's right to provide sewer service to two new schools being constructed in CWS's Commission certificated and York County franchised service area. This litigation was conducted in

[5]*Hamm v. S.C. Public Service Com'n*, 315 S.C. 119, 432 S.E.2d 454 (1993).

both the Circuit Court and the South Carolina Court of Appeals and is described exhaustively in the testimony of CWS witness Daniel. Daniel Direct, p. 1. l.14 - p. 5, l.11. A settlement reached in this litigation, which preserved the integrity of CWS's service area and substantial service revenues, was also submitted to the Commission for its approval, which was granted in Order No. 1999-660 dated September 17, 1999. Daniel Direct, p. 4, ll. 17-20. The Commission finds that legal expenses incurred by a utility to protect by litigation its authorized service area from invasion by other entities is unanticipated and non-recurring, cannot be characterized as "routine and required at regular intervals," and is therefore an extraordinary expense permissible under *Porter*.

(c) The Landings, Inflow and Infiltration Study, and Lake Murray Bulk Water Agreements

Staff witness Scott audited the books and records of CWS as part of the Audit Department's review of the application for rate relief and prepared the Staff report which was entered into evidence. Scott Direct, p. 1, l. 19 - p.2, l. 10. She specifically addressed CWS's claimed pre-test year expenses incurred in connection with the matters involving The Landings subdivision, an inflow and infiltration study, and Lake Murray Bulk Water Agreements in her pre-filed direct testimony and confirmed that they were deferred expenses because they were unanticipated and non-recurring. Scott Direct, p. 7, ll. 1 -4 and 6-11. This testimony was not challenged by the Consumer Advocate on cross-examination of witness Scott. Even if witness Scott's testimony on this point had been challenged, the Commission is entitled to resolve factual disputes as it sees fit as long as there is substantial evidence to support its findings. Ms. Scott's testimony provides that substantial evidence. The Commission discerns no error in classifying the expenses

incurred in connection with the matters involving The Landings subdivision, an inflow and infiltration study, and Lake Murray Bulk Water Agreements as Deferred Expenses.

As his third ground of alleged error, the Consumer Advocate contends that the Commission failed to address his arguments that CWS has been permitted to over-recover rate case expenses allowed in CWS's last rate case by some $250,000 and that an adjustment to rate case expense in that amount should be made, which netted against the $116,793 rate case expense allowed by the Commission, "would lead to a negative recovery of rate case expenses in the current case." Consumer Advocate's Petition at 4-5. According to the Consumer Advocate, his "proposal in this case is to recognize the effect of [rate case] expenses that were previously approved, but over-recovered." Petition at 5. The Commission finds the Consumer Advocate's assertion to be without merit for several reasons.

It is well established that rates previously approved by the Commission are presumptively correct. *Hamm v. S.C. Public Service Com'n*, 315 S.C. 119, 432 S.E.2d 454 (1993). Orders approving a utility's rates are likewise presumed to be valid and reasonable and have the force and effect of law. *S.C. Cable Television Ass'n. v. Southern Bell Tel. and Tel. Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992). Absent a challenge to previously approved rates which results in a determination that same are unlawful, a utility is entitled to collect and retain same. *Hamm*, 432 S.E.2d at 458. The record in this case demonstrates that there have in fact been challenges made to the reasonableness of the Company's rates approved in the 1994 rate case. See discussion at pp. 9-11, supra. Accordingly, the Company's 1994 rates, as modified in Order No. 98-163, are reasonable

as a matter of law and the Company could not, therefore, have "over-recovered" any rate case expenses which may have been subsumed within the rates approved in that case. Moreover, the fact that CWS's customers - particularly those represented by the RHCA - have submitted to the Commission complaints challenging CWS's rates in the period between CWS's previous and current rate case demonstrates quite clearly that there is no danger to customers that "imprecise. . . timing between rate cases" will deprive customers of the equal protection of law. Petition at 6. In fact, the Commission's Order No. 2001-498 in the instant docket demonstrates quite clearly that CWS's rates are susceptible to being challenged.

Contrary to the Consumer Advocate's assertion otherwise, his argument does not require "an interpretation of the effect of the Supreme Court's ruling in *Porter*" (Petition at 5-6) since that case does not deal with "under-recovered" rate case expenses - i.e., those which could have been, but were not, requested and allowed in a prior rate case. *Porter* dealt only with the allowance of the CWS's *unrecovered* rate case expense - i.e., "the remaining unamortized rate-case expense, previously approved but unrecovered" (*Id.* 493 S.E.2d at 98). The Consumer Advocate's contention that there is no difference in the meaning of the words "under-recovered" and "un-recovered" is incorrect. The gist of the Consumer Advocate's argument is simply that CWS has been allowed to recover through its rates and the passage of time more rate case expense than it requested and was allowed in the 1994 rate case. Therefore, for *Porter* to have any application in the instant case, the circumstances before the Court in that case would have to have been that the Commission allowed CWS in its 1994 case rate case expenses relating to the CWS's

1993 rate case that CWS had not asked for in the 1993 case, but had nonetheless incurred. These are not, of course, the circumstances that were presented to either the Commission or the Supreme Court in *Porter* and that is why the Consumer Advocate's argument collapses under its own weight. There is obviously a difference between an under-recovered and an unrecovered expense.

Next, the Consumer Advocate asserts error by the Commission in approving rate case expenses of $116,793. The Consumer Advocate's contention is essentially that there is no substantial evidence to support the Commission's allowance of $116,793 in rate case expenses. Consumer Advocate's Petition at 6. In Order No. 2001-887, the Commission provided an extensive discussion of rate case expenses. Order 2001-887 at 30-34. The Consumer Advocate asserts that the Commission erred in "finding that the rate case expenses were known and measurable, and supported by evidence provided by CWS in the form of invoices and billings." Consumer Advocate's Petition at 6. The Consumer Advocate's position appears to take issue with a sentence which reads "CWS has provided evidence in the form of invoices as to expenses as of August 6, 2001, hearing showing a total of $117,298 in unaudited rate case expenses." Order No. 2001-887 at 31. Later, the Commission stated "[a]s CWS has provided documentation in the form of invoices and billings as of the date of the August 6, 2001, hearing, the Commission finds that the August 6, 2001, hearing is the appropriate "cut-off" for rate case expenses." Order No. 2001-887 at 32. To the extent that Order No. 2001-887 may have indicated that the invoices and billings were admitted into evidence at the hearing, the Commission takes this opportunity to correct that misperception. The invoices and

billings were provided to the Staff to review, and a summary of the totals was entered into evidence, without objection, at the hearing. *See* Hearing Exhibit No. 13.

Upon considering the Consumer Advocate's Petition, the Commission finds the contention of the Consumer Advocate regarding the lack of substantial evidence to support the Commission's decision on the level of rate case expense to be without merit. First, the rate case expense allowed by the Commission is approximately $3,000 less than that recommended by the Consumer Advocate's own witness. Bleiweis Direct, p.7, ll. 12-19. The recommendation of witness Bleiweis was made only after witness Bleiweis discussed at length the expenses claimed, compared it to the amount of expense claimed in CWS's prior rate case, and engaged in an exhaustive analysis of why he believed the expense claimed for Company personnel involved in the rate case was excessive. Bleiweis Direct, p. 5, l.1 - p. 7, l. 11. His expert accounting witness having testified that $120,000 was a reasonable rate case expense, the Consumer Advocate cannot now be heard to complain when the Commission awards a lesser amount. Second, the Consumer Advocate did not object to CWS's late-filed hearing exhibit in which CWS provided the amount of the rate case expenses that it had incurred between the time of the Staff's late Spring audit and the hearing date. Accordingly, there was evidence to support the Commission's allowance of updated rate case expense. Third, although specific invoices and billings were not entered into evidence, Staff witness Scott testified that such invoices and billings were provided to Staff for review prior to hearing. There is no requirement that the Company submit into evidence an invoice or billing for any expense

it claims and the Consumer Advocate has cited no authority for that proposition. This contention is therefore without merit.

Finally, the Consumer Advocate alleges error by the Commission in not addressing his rate design proposal as contained in the Consumer Advocate's post-hearing brief. The Consumer Advocate failed to bring any such rate design proposal to the Commission's attention by evidence or argument at the hearing. In his Petition, the Consumer Advocate acknowledges that "the Commission did not address the Consumer Advocate's rate design proposal made in his Brief..." Consumer Advocate's Petition at 6 (emphasis supplied). Consumer Advocate witness Bleiweis testified that he had reviewed CWS's application, CWS's responses to the Consumer Advocate's interrogatories, and CWS's responses to the Staff's data requests. Id., p.4, ll. 2-7. He even purported to reserve to himself the right to modify his testimony and exhibits if necessary. Id., p.4, ll. 9-10. Yet, Mr. Bleiweis made no reference in his testimony to CWS's proposed rate design - much less a proposal that it be modified. Nor did the Consumer Advocate sponsor surrebuttal testimony on this point. Having failed to raise this matter at hearing, the Consumer Advocate may not raise it for the first time in the Petition. *Patterson v. Reid, supra.*

Even if this point had been properly raised, there is no evidence of record to support the findings which would be needed in order to give effect to the Consumer Advocate's "proposal." For example, the Consumer Advocate contends that "[c]onsumption based rates should always be increased before base rates, because this encourages conservation, and delays the need for construction of new facilities."

Consumer Advocate's Post-Hearing Brief at 17 (emphasis supplied). There is no evidence of record to support the emphasized portion of this contention. Without such evidence, the Commission cannot reach the remaining portion of the Consumer Advocate's "rate design proposal."

Therefore, based upon the explanations found in Order No. 2001-887 and the discussions above, the Commission finds no basis to the allegations of error raised by the Consumer Advocate, and the Commission hereby denies the Consumer Advocate's Petition for Reconsideration.

IT IS THEREFORE ORDERED THAT:

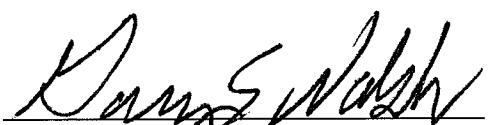
1. The Petitions for Reconsideration filed by RHCA and the Consumer Advocate are denied.

2. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:



Executive Director
(SEAL)